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Filed Nov. 25, 1901.

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

No. 128.

JOHN C. GOODRICH AND CLARENCE M. BURTON,
PLAINTIFFS IN ERROR,

vs.

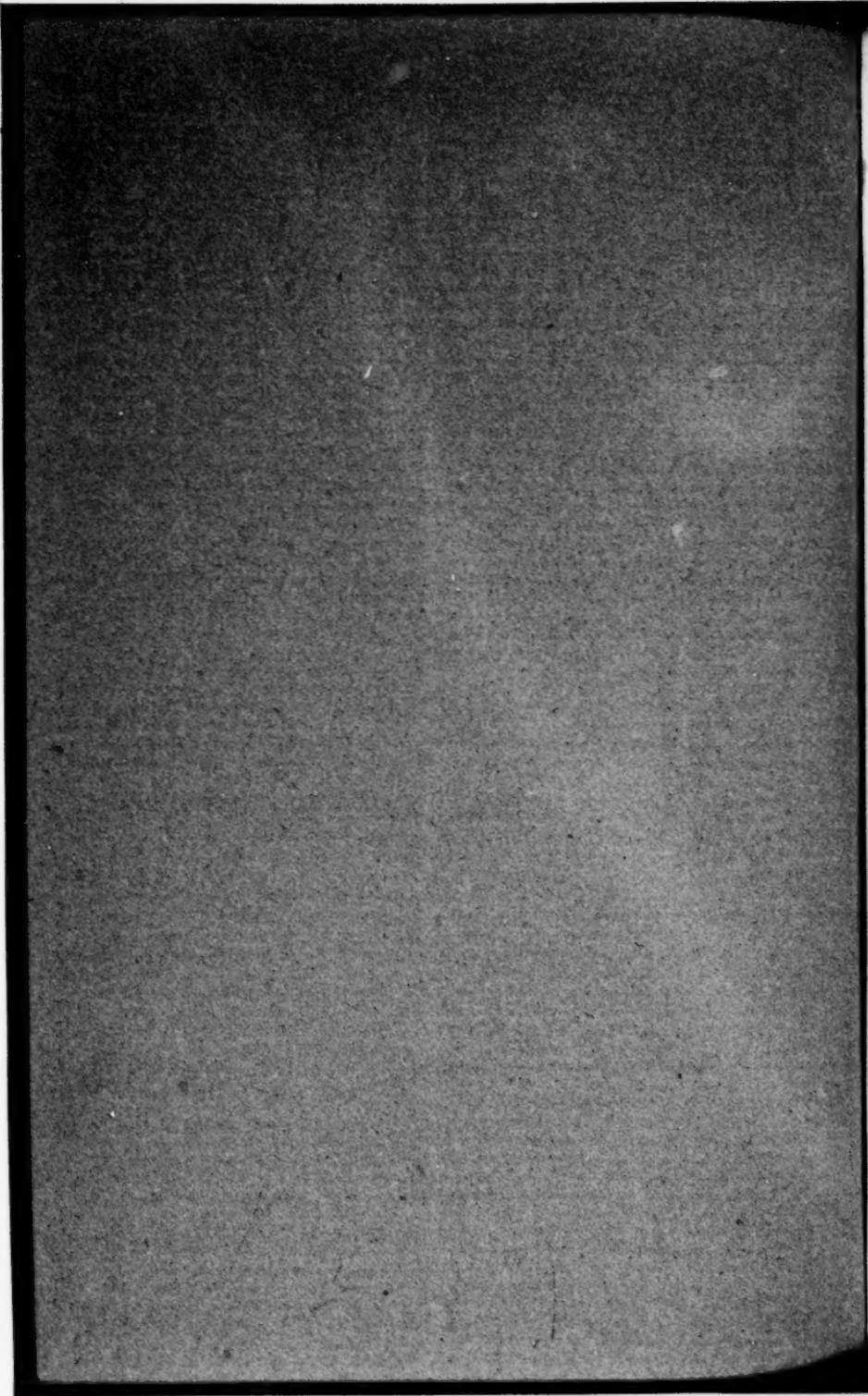
THE CITY OF DETROIT AND LOUIS B. LITTLE-
FIELD, TREASURER OF THE CITY OF DETROIT.

Error to the Supreme Court of the State of Michigan.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR
PLAINTIFFS IN ERROR.

ELBRIDGE F. BACON,
Counsel for Plaintiffs in Error.

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THE CITY OF DETROIT AND LOUIS B. LITTLE-
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Error to the Supreme Court of the State of Michigan.

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PLAINTIFFS IN ERROR.

This is a writ of error to the Supreme Court of the State of Michigan, to review its decision sustaining special assessments against the lands of John C. Goodrich and Clarence M. Burton, in the City of Detroit, for the expense of opening Milwaukee avenue. The assessment was attacked by complainants on the ground that the act under which such proceedings were had, and the proceedings taken thereunder, deprived the complainants of property without due process of law, and were in violation of the Fourteenth Amendment to the Constitution of the United States.

Goodrich et al. vs. City of Detroit, 123 Mich., 559.

The proceedings to open this street were under the Statute of the State of Michigan authorizing the cities and

villages to take private property for the use or benefit of the public.

1 Mich. Comp Laws, 1897, Secs. 3392-3435.

The act, so far as it is material to the questions raised in this case, after providing for a preliminary resolution by the Common Council, is as follows:

"Sec. 3394. The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council, board of trustees or board of supervisors, shall be annexed, which certified copy shall be *prima facie* evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use or benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. *A description of the property to be taken shall be given*, and generally the nature and extent of the use thereof, that will be required in making and maintaining the improvement shall be stated, and *also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises*. The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. *The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor*. The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395: Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition, stating briefly the object of said petition, and commanding them, in the name of the People of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause if any they have, why the prayer of said petition should not be granted.

"Sec. 3399: The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just. If any such private property shall be subject to a mortgage, lease, agreement or other lien, estate or interest, they shall appportion and award to the parties in interest such portion of the compensation as they shall deem just.

"Sec. 3400: To assist the jury in arriving at their verdict the court may allow the jury, when they retire, to take with them the petition filed in the case and a map showing the location of the proposed improvement, and of each and all the parcels of property to be taken, and may also submit to them a blank verdict which may be as follows:

PART I.

"We find that it is. necessary to take the private property described in the petition in this cause, for the use and (or) benefit of the public, for the proposed public improvement.

PART II.

"The just compensation to be paid for such private property we have ascertained and determined, and hereby award as follows."

(Here follows schedule with the following headings:)

Description of each of the several parcels of private property to be taken.

Owners, occupants, and others interested in each parcel.
Compensation.

To whom payable.

"The different descriptions of the property and the names of the occupants, owners, and others interested therein, may be inserted in said blank verdict, under the direction of the court, before it is submitted to the jury, or it may be done by the jury.

"Sec. 3403: *Any person whose property may be taken, considering himself aggrieved, may appeal from the judgment of the court confirming the verdict of the jury by filing in writing with the clerk of said court a notice of such appeal within five days after the confirmation, and within the same time serving a copy thereof on the city or village attorney, or prosecuting attorney of the county, and filing a bond in said court, to be approved by the judge thereof, conditioned for the prosecution of said appeal to judgment and the payment of all costs, damages and expenses that may be awarded against him, in case the judgment of confirmation shall be affirmed. Such appeal shall be perfected within the same time and prosecuted as an appeal in chancery, as near as may be, subject to the provisions of this act.*

"Sec. 3406: *When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon, the proper and necessary proceedings in due course shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees, or board of supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city, (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed*

to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and *prima facie* evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made, until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city, (or) village or county, may become a purchaser at the sale."

On the 14th of November, 1893, a resolution (R., p. 8) was passed by the common council of the City of Detroit, providing for the opening and extending of Milwaukee avenue.

On the 6th of January, 1894, the petition (R., p. 8) of the City of Detroit, for the opening and extending of Milwaukee avenue was filed in the Recorder's Court of the City of Detroit.

On the 6th day of March, 1894, the verdict of the jury was rendered and judgment entered thereon, condemning certain lands, and fixing the total amount of the damages for taking lands, at the sum of \$15,214.75.

On the 7th day of August, 1894, a resolution was passed by the common council, fixing an assessment district, and providing for the assessment of the total amount of the damages on the property described in the resolution "*in proportion, as near as may be, to the advantage which such lot or parcel is deemed to acquire by such improvement,*" and of this amount the sum of \$1,356 was assessed on the lands of complainants.

A bill was filed in the Circuit Court for the County of Wayne, in Chancery, (that being the State court of original jurisdiction), and after a hearing on the merits, a decree was entered dismissing the bill of complaint, and this decree was affirmed by the Supreme Court of the State of Michigan.

The errors relied upon are:

1. That the Supreme Court of Michigan erred in sustaining the statute against the objection that it is in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it provides for taking property without due process of law.
2. That said court erred in sustaining the proceedings taken under said statute against the objection that they are in conflict with the Fourteenth Amendment to the Constitution of the United States, in that they deprived the complainants of property without due process of law.

I.

COMPILED LAWS, Sec. 3394, provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, * * * also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises."

Sec. 3395 provides that the clerk of the court shall issue a summons against the respondents named in the petition, requiring them to appear before the court at the time named therein, and show cause why the prayer of said petition should not be granted.

Sec. 3403 provides: "Any person whose property may be taken, considering himself aggrieved, may appeal from the judgment of the court confirming the verdict of the jury, etc."

The foregoing is the substance of all the provisions contained in the statute for giving notice to any persons in

regard to the proceedings for condemning lands and fixing the amount of compensation.

While the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. The owners of property liable to be assessed to pay for the opening of the street, are just as much interested in the question as to the necessity of making the improvement, and the amount of compensation, as the owners of lands to be taken for such street, and the same reasons for notice apply in the one case as in the other.

As the statute does not provide for any such notice or hearing, or any tribunal where the land owners liable to assessment can have a hearing as to those questions, it is in violation of the Fourteenth Amendment to the Constitution of the United States.

Paul vs. City of Detroit, 32 Mich., 108.

Commissioners vs. Fahlor, 132 Ind., 426.

State ex rel. Flint vs. Fond du Lac, 42 Wis., 287.

Stewart vs. Palmer, 74 N. Y., 183.

Scott vs. City of Toledo, 36 Fed. Rep., 385.

In *Paul vs. City of Detroit, 32 Mich., 108*, which was a proceeding to lay out an alley and assess for the expenses, the Court say (page 116) : "Personal notice is to be given to owners and occupants of property intended to be taken, if found, or notice posted on the premises. No notice is provided for to the parties on whom the burden is to be charged, and want of notice to any one is not to oust the jurisdiction. We can only conjecture that this omission was accidental as notice is just as necessary to the persons liable to pay for the alley as to those whose lands are taken, but both have a right to be heard before the jury."

In *Commissioners vs. Fahlor, 132 Ind., 426*, the Court say: "Notice is essential to confer jurisdiction in proceedings for the establishment of a public road, where an adjacent owner's land is sought to be subjected to a special assessment."

In *State ex rel. Flint vs. Fond du Lac, 42 Wis., 287*, the plaintiff was the owner of land assessed to pay damages for opening a street, but was not the owner of any land taken

for the street, and he brought certiorari to set aside the proceedings. The Court say (page 298) : "But we think the proceedings were fatally defective because the charter makes no provision for giving a proper notice to the owner, of the time and place for the appointment and meeting of the jury, which determines the necessity of taking his property. Where the owner is known, and lives, or has an agent or tenant living, within the municipality, a personal notice of these steps is essential, and must be given, or the proceedings will be void. * * * (299). It is true, the property of Mr. Robert Flint was not taken for the street, but was assessed for benefits resulting from the improvement. Such an assessment of benefits is doubtless an exercise of the taxing power, as contended for by the counsel for the city; still *the relator is in a position to object that the proceedings for the condemnation of the land were illegal and void. For the benefits to her property consequent upon the opening of the street vitally depend upon the question whether the power of eminent domain has been properly exercised in procuring the right of way. This seems quite obvious. It follows from these views, that on account of the failure of the charter to provide for the giving of personal notice to the owner of the property of the time and place of the appointment and meeting of the jury, to inquire into and determine the necessity, the proceedings were void.*"

In Stewart vs. Palmer, 74 N. Y., 183, which was an action to restrain the collection of an assessment for improving a street, where the act under which the proceedings were had, while it provided for a notice and hearing as to the persons whose land was to be taken, did not contain any express provision for the notice and hearing of parties who were assessed to pay for such improvement, the Court say (page 188) : "Here was an expense for local improvement of more than one hundred thousand dollars. The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits. The assessment, when made, was declared to be a lien upon the land, and its payment could be enforced by a sale thereof. *I am of opinion that the Constitution sanctions no law imposing such an assessment without a notice to and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them a right to a hearing or an oppor-*

tunity to be heard. * * * (190). Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard. The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing."

In Scott vs. City of Toledo, 36 Fed. Rep., 385, which was an action to restrain an assessment on a street opening case, Mr. Justice Jackson, in delivering the opinion of the Court, says (page 397): "The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity before him to be heard in respect to the proceedings under which his property is to be taken or burdened, before the tax and assessment becomes final and effectual, in order to constitute such procedure due process of law. If a tax or assessment can under the state law be enforced or collected only by legal proceedings in which any and all defenses going either to the validity or amount of such tax or assessment may be made, that will afford the opportunity to be heard, and in such cases the proceedings cannot be said to deprive the owner of his property without due process of law, however objectionable or unjust it may be otherwise. * * * (400) The common council of Toledo having made the assessment in question, without notice to or opportunity for hearing by complainant, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense, either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution, before depriving a citizen of his property."

II.

Sec. 3406, Compiled Laws of the State of Michigan of 1897, provides: * * * "If the common council, or board of trustees, or board of supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon they shall by resolution fix or determine the district or portion of the city, village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. * * * The assessment roll containing said assessments when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive and *prima facie* evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made, until payment thereof, etc."

This statute is in violation of the 14th Amendment to the Constitution of the United States, for the following reasons:

(a) Because the statute authorizes the common council to fix the district claimed to be benefited, without providing for any hearing by the parties whose lands are included in the district, as to whether all the land benefited by the improvement is included in the district, and whether the taxpayer's lands should be included in the district or not.

This district is fixed by the common council *ex parte*, and the taxpayer can have no relief, even though it should

be conclusively shown that property especially benefited has been omitted from the district, or that his property is not benefited and should not have been included in the district.

(b) Because the statute does not afford the property owner notice and opportunity to be heard as to whether the amount imposed upon the district by the common council is not in excess of the total benefits received by the district.

The common council, under the statute, conclusively determine the amount to be assessed upon the district, and the only duty left to the assessors in making the assessment is to apportion that amount upon the property in the district, *in proportion to the benefits*, and does not limit the amount to be assessed upon such property to the amount of the benefits accruing from such improvement.

The determination by the aldermen of the land benefited, and the amount to be assessed upon the land, is judicial in its nature, and cannot be binding upon the taxpayer, and the taxpayer is entitled to a hearing before his rights are finally determined by such action.

Sears vs. Street Commissioners, 173 Mass., 350
355.

Murdock vs. City of Cincinnati, 39 Fed. Rep.,
891.

In Sears vs. Street Commissioners, 173 Mass., 350-355, the Court say (page 355): "It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi judicial proceeding which cannot take final effect unless the persons to be assessed have an opportunity to be heard."

(c) Because the statute, by its express terms, authorizes the city council to assess the whole, or any just proportion, of the amount awarded by the jury, upon the lands in such assessment district, without limiting such

assessment to the amount which the lands included in such district are benefited by the improvement.

Detroit vs. Judge of Recorder's Court, 112 Mich., 588.

Norwood vs. Baker, 172 U. S., 269.

Tidewater Co. vs. Costar, 18 N. J. Eq., 518.

State vs. Newark, 37 N. J. L., 415.

New Brunswick vs. Commissioners, 38 N. J. L., 190.

Barnes vs. Dyer, 56 Vt., 469.

Stewart vs. Palmer, 74 N. Y., 183.

In City of Detroit vs. Judge of Recorder's Court, 112 Mich., 588, which was an action of mandamus to compel the respondent to reinstate proceedings which he had quashed, on the ground that the charter of Detroit providing for assessing the damages for opening streets, was unconstitutional, the Court say (page 589): "The theory upon which such assessments are sustained as a legitimate exercise of the taxing power, is that the party assessed is locally and peculiarly benefited, over and above the necessary benefit which as one of the community he receives in all public improvements, to the precise extent of the assessment. * * * So a law directing such an assessment as the commissioners should deem '*just and equitable*' was held unconstitutional, because it did not direct the fact to be found that the property was benefited to the amount of the tax imposed. * * * Applying this rule to this act, it must be declared void. It contains no provision which requires an assessment upon the local district to be in proportion to the benefits received. The common council are not required to determine when they establish the district to what extent it is benefited."

In Tidewater vs. Costar, 3 C. E. Green (18 N. J. Eq.), 518, where the act provided for the organization of a company to drain certain lands, and the appointment of commissioners who "*shall assess upon the said lands so reclaimed a just proportion of the contract price and of the expenses of said commission,*" and commissioners were appointed and an assessment made, and it was objected that the tax was invalid for the reason that the act did not limit the assessment to the amount of benefit to the land. The Court say (page 526): "But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and so must prevent its judicial enforcement.

The defect alluded to is this: No provision is made for the indemnification of the owner of the land subject to the operation of this law in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lots, whether such expense falls below or rises above the increase in value which may accrue to the land by reason of such drainage. * *

* The statute does not require that the apportionment of expense shall be limited as the maximum rate by the increase in value to result from the improved condition of the land. Now, therefore, it seems to me obvious that if this scheme be carried into effect, in the event of an excess of expense over benefits, private property pro tanto will be taken for public use without compensation."

In *New Brunswick Co. vs. Commissioners*, 38 N. J. L., 190, which was certiorari to review an assessment for the construction of sewers, where the statute provided for the appointment of commissioners of streets, and authorized them to construct sewers and drains and "shall ascertain the whole cost thereof and the size of all lots or separate parcels of ground drained thereby, and shall fix the amount to be paid for each in such proportions as may in the judgment of such commissioners be just and equitable." The Court say (page 192): "The power to tax for the expense of local public improvements, lots peculiarly benefited by such improvements, in proportion to and to the extent of the benefits received, when properly authorized by legislative enactment, is not drawn in question in these cases. The claim of the prosecutor is that there is no law authorizing such tax in this case; that the act under which the commissioners have sought to impose this special assessment is invalid. * * * An act of the legislature directing a tax for local improvements to be imposed upon particular lots, to be legal or effectual, must consist of something more than the mere authorization to assess a sum of money, the cost of a local improvement, upon the designated property. The act must determine the mode of distributing the burden. The property out of which the tax is to be made must be designated and some certain standard of assessment established. It cannot properly be left by the legislature to the discretion of others to fix the method. * * * The only safe rule is that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must

be made to conform. In no other way can property be adequately protected."

In Barnes vs. Dyer, 56 Vt., 469, which was an action brought to recover an assessment, where the statute empowered the authorities of the city to construct sidewalks and make local assessments on the property fronting on the same "*for so much of the expense thereof as they shall deem just and equitable,*" and it was objected that the words "just" and "equitable" did not define a legal standard of assessments, the Court say (page 471): "The cases differ somewhat as to how the benefit may be determined, whether by the frontage or superficial area, but no such question arises here. The only question here is whether the phrase '*as they shall deem just and equitable*' is sufficiently certain as a standard of assessment. * * * The act in question makes no express allusion to assessment on account of benefit, neither does it limit the assessment to the amount of benefit, yet, as we have seen, the right to assess at all depends solely on benefit, and must be apportioned to and limited by it. An improvement might cost double the benefit to the lands particularly benefited. * * * (473.) We think the act in question failed to set up a standard by which all assessments for sidewalks in Vergennes must be made. That the words 'just' and 'equitable' do not import with reasonable certainty a limitation to particular benefits to property benefited, we do not think, but that one member of the common council construed the words as applying to one consideration, and another member to another consideration, nor that any of them limited the consideration to benefits. In short, the enactment was inadequate to the purpose designated by it."

III.

The resolution of the common council directing the assessment is as follows:

"Resolved, That the common council of the City of Detroit, do hereby fix and determine that the following district and portion of said City of Detroit, to wit (here follow descriptions), is benefited by the opening of Milwaukee avenue from Chene street to Mt. Elliott avenue, where not already opened; and further resolved, that there be assessed and levied upon the several pieces and parcels of real estate, included in the above description,

the amount of \$15,214.75, in proportion as near as may be to the advantage which such lot or parcel is deemed to acquire by such improvement; and further resolved, that the board of assessors of said City of Detroit, be, and they are hereby directed to proceed forthwith to make an assessment roll in conformity with the requirement of the charter of the City of Detroit relating to special assessments for collecting the expenses of such improvement when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of \$15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance with the amount of benefit derived from such improvements."

This resolution is in conflict with the 14th amendment to the Constitution of the United States, for the following reasons:

(a) Because it does not find that the property included in the assessment district is benefited to the amount ordered to be assessed upon such district.

Adams vs. Bay City, 78 Mich., 211.

Greely vs. The People, 60 Ill., 19.

Crawford vs. The People, 82 Ill., 557.

Chamberlain vs. Cleveland, 34 O. St., 551.

Dyar vs. Farmington, 70 Me., 515.

In Adams vs. Bay City, 78 Mich., 211, which was an action to recover back money paid under protest for an assessment levied for the construction of a sewer, and it was objected that the records did not show that the benefits equaled the cost of the work, the Court say (page 215). "Nowhere, then, does it appear, unless taken for granted, that the benefits of this work equal the tax laid by the controller, or that the lands were assessed in proportion to the benefits specially derived by them from such work. We think that this cannot be taken as granted; that this roll should show expressly that the assessment was made on the basis which the charter lays down, and this is not an irregularity which is cured by the provision that the roll after endorsement shall be prima facie evidence of the validity of the tax. It is jurisdictional and must appear upon the roll, and we think it should also appear somewhere that the benefits to the whole property included in the taxing district would equal the whole cost of the proposed work. • • •

* Under the section as it stood when this tax was laid, the whole cost was laid on the property specially benefited. The plaintiff had a right to demand that there should be a finding of benefits, and that also it should appear on the assessment roll or somewhere on the record, in what manner these benefits were apportioned and under what rules. He had a right to know upon what standard or basis the controller acted, that he might ascertain whether or not it was a legal one."

In Chamberlain vs. Cleveland, 34 Ohio St., 551, which was an action to set aside certain assessments for opening a street, where the statute provided that "in all cases in which it was determined to assess the whole or any part of the cost of any improvement upon the lots or lands bounded or abutting upon the same, or upon other lots or lands benefited thereby, the council may require the board of improvements, or may direct three disinterested free-holders of the corporation or of the vicinity, to report to the council an estimated assessment of such costs on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement of the several lots or parcels of land so assessed," etc. The common council passed a resolution ordering the board of improvements to prepare an estimated assessment, as required by law, and afterwards the board of improvements submitted an "estimated assessment upon the property benefited, to pay the damages and costs incurred in opening and extending Bond street."

The Court says (page 564): "It is claimed that the assessment is invalid and void on the ground that it fails to show that it is based upon the value of the special benefits conferred by the opening of the street, or that it is properly apportioned, and that these things are apparent on the face of the proceedings which are made a part of the record. It seems to us that this objection is well taken. It is essential to the validity of an assessment that the proceedings by which it is made must show upon their face that the requirements of the law have been substantially complied with, and that the restrictions imposed by law upon the exercise of the power have been observed in such a way that the owner of the lot assessed has had the benefit of the protection they were intended to give. * * *

(571) When the municipal authorities in levying special assessments do not undertake to determine the amount of the special benefits conferred, either in respect to the amount assessed, or in the apportionment of the

burden, the assessment may be enjoined, and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis."

(b) Because the resolution of the common council directed the assessors to make an assessment roll, "upon which they shall assess and levy the amount of \$15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance with the amount of benefit derived from such improvements."

By this resolution the assessors were not directed to assess upon each piece of property only such amount as it was benefited, but were directed to assess the entire amount ratably upon the various lots, in proportion to the benefit to each lot, although such assessment might be several times the amount of the benefit; and while the proportion may have been maintained as between the various parcels of property, still the assessment was not limited to the benefit to each lot, and was void.

Greely vs. The People, 60 Ill., 19.

In *Greely vs. The People, 60 Ill., 19*, which was an appeal from a judgment of the court sustaining taxes levied for the improvement of a highway upon certain lots, and it was objected that the resolution of the common council was defective for the reason that it did not find that the land would be benefited to the amount of the assessment, the Court say (page 21): "The ordinance directing the special assessment orders the sum of \$125,200.11 to be assessed 'upon the real estate deemed benefited by such improvement, in proportion, as near as may be, to the special benefits resulting to each separate lot or parcel thereof.' * * * It will be perceived at once that this ordinance is fatally defective. It assumes there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measure to ascertain that fact, but arbitrarily directs the imposition of this sum as a tax upon property benefited, though it might well be that the aggregate of all special benefits to be derived from the improvement would be but a small fraction of the sum assessed. * *

* The principle of proportion between different lots was indeed preserved, but that was all. Inasmuch, then, as the ordinance disregards the principle of equality between burden and benefit, and imposes this tax upon the

property benefited, though the benefit may be but a fraction of the tax, we must hold it void upon principles well settled in this court."

IV.

It appears from an inspection of the petition and verdict of the jury, that there were several of the parcels of land constituting the extension of Milwaukee avenue, that were so defectively described that the judgment of condemnation was absolutely void, among which were the following:

"Commencing at the intersection of the westerly line of said lot 2, and the southerly line of Milwaukee avenue, thence south 64 degrees west 443.40 feet, thence south 79 degrees 4 inches west 230.64 feet, thence south 64 degrees west 222.14 feet, thence south 27 degrees 44 inches east 60.03 feet to the place of beginning."

It will be observed that this simply describes a line, and does not describe any piece of land whatever, as all the courses except the last course are southwest.

Also the following:

"Between lines of Joseph Campau avenue extended."

"60 feet of east 101.20 feet east of and adjoining Joseph Campau avenue extended."

"20 feet of east 121.20 feet east of and adjoining Joseph Campau avenue extended."

"West 101.20 feet lying west of and adjoining Mitchell avenue extended."

"East 100 feet lying east of and adjoining Mitchell avenue extended."

"East 20 feet of east 120 feet lying east of and adjoining Mitchell avenue extended."

"West 100 feet lying west of and adjoining McDougall avenue extended."

It will be observed that Milwaukee avenue runs substantially east and west; that these descriptions of land extend north and south; but it does not appear what parts of these descriptions are taken, whether it is the

north end, or the south end, or the middle, so that the land to be taken is not described in any manner.

And the map, which is attached to and made a part of the petition (R., 13), does not show what descriptions, if any, were taken. The part of the street which was opened by these proceedings is printed in red, but the lots and parts of lots which are taken cannot be ascertained from the map.

It also appears (R., 27) that the Dime Savings Bank had a mortgage of five hundred dollars on two lots of land taken in the street opening proceedings, and that the Dime Savings Bank was not made a party to such action, so that the interests of the Dime Savings Bank in said lots were not condemned.

As the petition of the City of Detroit, and the certified copy of the resolution to the common council, attached thereto, do not describe the several parcels of land to be taken for such improvement, the court has no jurisdiction to proceed in the matter.

Matthias vs. Drain Com'n., 49 Mich., 465.

Toledo Ry. Co. vs. Munson, 57 Mich., 42.

Ry. Co. vs. Circuit Judge, 95 Mich., 318.

Galena, Chicago Ry. Co. vs. Pound, 22 Ill., 399.

Chicago & N. W. Ry. Co. vs. Chicago, 132 Ill., 372.

Re N. Y. Central & Hud. R. Ry. Co., 70 N. Y., 191.

Cal. Central Ry. Co. vs. Hooper, 76 Cal., 404.

In Matthias vs. Drain Commissioner, 49 Mich., 465, where the petition to the Probate Court for the appointment of commissioners described the ditch as a line but gave no width, the Court say: "Where land is to be taken from the owner for public purposes, the description should be as definite as is necessary in a deed, and if several successive steps are to be taken in the course of which the land must be identified and described, the description should be sufficient in every instance that it may be seen that the successive steps are not referable to different premises."

In Toledo Railway Co. vs. Munson, 57 Mich., 42, which was an appeal from the Probate Court, where it was alleged that the petition was not sufficient to confer juris-

diction on the Court, the Court say (page 44) : "It is, therefore, proper here to point out that the petition filed as the foundation of these proceedings, was insufficient to confer jurisdiction because it did not comply with the requirement of the statute prescribing what such petition should contain. *The law requires that each distinct parcel of land shall be described, and the owner thereof, if known, shall be named.*"

In Railway Company vs. Circuit Judge, 95 Mich., 318, which was an application for a mandamus to compel respondent to appoint commissioners to condemn certain lands for the railway, where the petition stated that it was necessary "to use and occupy a strip, piece or parcel of land, not exceeding 18 feet, lying between the outer limit of the land actually occupied by the roadbed of said Detroit & Saline Plank Road Company, and the sidewalk line as established, and liable to be established and as shown by the map and survey herewith filed and such crossings, switches, sidings and connections therewith, as may be essential and necessary." The Court say (page 320) : "*Where land is to be taken for public purposes the description should be as definite as is necessary in a deed.*"

In re N. Y. Central & Hudson R. Ry. Co., 70 N. Y., 191, to condemn certain lands, where it was claimed that the description of the land was insufficient, the Court say (page 193) : "The description of the first parcels of land set forth in the petition which the company seeks to acquire in these proceedings is manifestly defective. *The statute declares that the petition must contain a description of the real estate which the company seeks to acquire, and this provision cannot be complied with unless there is such a description of the land as will show its location and the boundaries thereof.*"

In California Central Ry. Co. vs. Hooper, 76 Cal., 404, which was an action to condemn the right of way for a railroad, where it was objected that the petition did not describe the land sought to be condemned, it was held that the complaint in a proceeding to condemn a right of way for a railroad company must contain a description of each parcel of land sought to be taken, whether the same includes the whole or only part of an entire tract, and the judgment must be so far certain as that the parties and any ministerial officer who may be called on to enforce it, may know what land is to be taken and paid for.

The verdict of the jury follows substantially the same descriptions given in the petition, and does not contain any description of the several parcels of land taken, and contains no data from which the several parcels of property condemned can be ascertained, and is, therefore, void.

*Milton vs. Drain Commissioner, 40 Mich., 229.
Railway Company vs. Hitchcock, 90 Mich., 533.
Vail vs. Morris & Essex R. R. Co., 21 N. J. L., 129.*

In *Milton vs. Drain Commissioner, 40 Mich., 229*, where the report of the commissioners did not show the width of the drain or the land which was to be taken, the Court say (page 332): "*The defect in the present case is vital. There is nothing in the record which makes known what specific land, if any, has been condemned.*"

In *Railway Company vs. Hitchcock, 90 Mich., 533*, which was an appeal from the proceedings in the Probate Court of Bay County, condemning the right of way for the railroad, it appeared that the lands of the relators consisted of three parcels, situated some distance apart, and it appeared that one of the lots had a frontage of 566 feet instead of 489 feet, as set forth in the petition. The Court say (page 544): "In the verdict of the jury the frontage of the first parcel is not given, although the frontage is made to conform with the frontage mentioned in the petition as to the other two parcels. The same omission occurs in the order of confirmation. We think this objection fatal to the award and, in fact, to the petition in its present form. It is always required that the petition must state with accuracy the quantity of land to be taken, etc."

In *Vail vs. Morris & Essex R. R. Co., 21 N. J. L., 189*, which were proceedings to condemn land for a railroad, it was held that the award of the commissioners under the act must contain a clear description of the land taken with reference to permanent monuments, and with definite and intelligible boundaries.

The proceedings being void the city did not acquire title to the street through such parcels, and not having acquired title it would have no authority to levy a tax to pay for such parcels, and as the amount of damages awarded by the jury, and the amount assessed upon the

property, included the sums allowed as compensation for such property, the assessment is unauthorized and void.

Brush vs. City of Detroit, 32 Mich., 42:
Detroit, M. & T. R. R. Co. vs. Detroit, 49 Mich.,
47.

Lawrence vs. Armstrong, 3 Missouri App., 574.

In **Brush vs. City of Detroit, 32 Mich., 42**, which was certiorari to Recorder's Court to review a street opening case, where the jury fixed the damage to the plaintiff at \$1,400 and assessed the benefits at \$1,900, and determined that the plaintiff should pay the sum of \$500 and the assessment was made for that amount; and it appeared that some of the parties had not been served, among them the plaintiff, with notice of the hearing, and it was objected that as the land had not been condemned, the assessment was unauthorized, the Court say (page 43): "The record fails to show whether any of the other parties whose lands were sought to be condemned in the same proceeding and for the same street, were personally notified, and hence it fails to show whether the proceeding eventuated in the legal assessment of the street, and yet the proceeding was entire, and so was the object of it. If as to any of the parties no valid street was laid in consequence of the want of proper notice to any of the land owners, it is difficult to see how the street can be regarded as lawfully established as against the relator, so as to compel him to pay the city money for benefiting him by the establishment of the street. * * * The proceeding, so far as it affects the relator, must be quashed."

In **Detroit, Monroe & Toledo Ry. Co. vs. Detroit, 49 Mich., 47**, which was certiorari to review proceedings in opening Harper avenue, in the City of Detroit, Judge Campbell, in delivering the opinion of the Court, says (page 48): "It appears that in opening this avenue it will become necessary to cross the lands and to a greater or less extent interfere with the premises of several railroad companies, and that this involved the principal damages. One of these, the Lake Shore & Michigan Southern Ry. Co., was not even named in the proceedings, although the jury awarded damages for the land taken. *That company did not appear, and the taking of land and assessment of damages are invalid absolutely.* The Detroit, Grand Haven & Milwaukee Ry. Co. was named, and had lands taken and damages awarded, but did not appear, and was not lawfully served with process. * * * *The*

damages assessed to these two companies alone made up a considerable sum charged on the various parties in the assessment district as benefited by the proposed improvement, but the assessment is void if the land is not lawfully condemned, as it has not been, and the way cannot be lawfully established."

In Lawrence vs. Armstrong, 3 Mo. App., 574, where an assessment was made for the benefits accruing from a street opening, and it appeared that the street had not been properly opened, the Court say: "Where street improvements have been made by a municipal corporation upon property which has not been dedicated or condemned to public use, there can be no recovery on a special tax bill issued after such improvements."

These objections were made before the trial court, and also before the Supreme Court of the State of Michigan on appeal. But it was held by the Supreme Court that the judgment could not be collateral^v attacked by complainants, although they were not made parties to the proceedings in any manner, and had no opportunity to be heard therein, or appeal from such judgment. In other words, the effect of the decision is to bind the complainants in this case by proceedings which are void upon their face for the want of jurisdiction, and such decision is in violation of the rights of the complainants under the 14th amendment to the Constitution of the United States, and is void.

The rights of no person can be concluded by the judgment in a case to which he is not a party.

Hill vs. Finch, 104 U. S., 261.

In Hill vs. Finch, 104 U. S., 261, the Court say: "It is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, or notified of its pendency. He had no opportunity or right in that case to controvert the claim of the Oregon Steam Navigation Co. to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment."

The effect of the decree of the Circuit Court for the County of Wayne, in chancery, dismissing the complain-

ants' bill, and the judgment of the Supreme Court of the State of Michigan in affirming such decree, is to deprive the complainants of the right of hearing in the original proceedings condemning the land for the street, and fixing the compensation, and also to deny them the right of contesting such proceedings in this or in any other case, and constitutes a denial of the rights of the complainants under the 14th amendment to the Constitution of the United States.

In Chicago R. R. Co. vs. Chicago, 166 U. S., 226, Mr. Justice Harlan says: "In our opinion, a judgment of the state court, even if it be authorized by statute, whereby private property is taken for the city, or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the 14th amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

We submit that the decree of the Supreme Court of the State of Michigan be reversed, and a decree entered as prayed for in complainants' bill.

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